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IN THE

Supreme Court of the United States

October Term, 1995

WILLIAM DAUBERT AND JOYCE DAUBERT, INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR JASON DAUBERT, AND ANITA DE YOUNG, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR ERIC SCHULLER,

Petitioners,

v.

MERRELL DOW PHARMACEUTICALS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

What initial burden, if any, does Fed. R. Civ. P. 56 impose on a moving party that seeks summary judgment on the ground that the non-moving party cannot prove its case?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

PROCEDURAL RULE INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 15

TABLE OF AUTHORITIES

Cases	*Pages*
ACLU Foundation of Southern California v. Barr, 952 F.2d 457 (D.C. Cir. 1991)	8
Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)	5, 7, 12
Augustine v. GAF Corp., 971 F.2d 129 (8th Cir. 1992)	8
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	*passim*
Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991)	8, 10, 13
Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993)	*passim*
Elkins v. Richardson-Merrell, Inc., 8 F.3d 1068 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1299 (1994)	8, 9
Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993)	10
Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)	3
Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14 (2d Cir. 1995)	8
Howard v. Gleason Corp., 901 F.2d 1154 (2d Cir. 1990)	9
In re Brazier Forest Products Inc., 921 F.2d 221 (9th Cir. 1990)	9
J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610 (3d Cir. 1987)	9
Manders v. Oklahoma Dept. of Mental Health, 875 F.2d 263 (10th Cir. 1989)	11
Russ v. International Paper Co., 943 F.2d 589 (5th Cir. 1991), *cert. denied*, 503 U.S. 987 (1992)	9, 10, 11

Cases (continued) ***Pages***

Schaefer v. Gulf Coast Regional Blood Ctr., 10 F.3d 327 (5th Cir. 1994) 11

Schertz v. Waupaca Cty., 875 F.2d 578 (7th Cir. 1989) . 11

Schroeder v. Barth, Inc., 969 F.2d 421 (7th Cir. 1992) . . 11

Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989) 9

United States v. Four Parcels of Real Property, 941 F.2d 1428 (11th Cir. 1991) 10

Vitkus v. Beatrice Co., 11 F.3d 1535 (10th Cir. 1993) . . 11

Willis v. Roche Biomedical Labs, Inc., 21 F.3d 1368 (5th Cir. 1994) 11

Statutes and Rules

28 U.S.C. § 1254(1) 1

Fed. R. Civ. P. 42 2

Fed. R. Civ. P. 56 . . . . . *passim*

Fed. R. Evid. 702 3

Law Review Articles

Bauman, *A Rationale of Summary Judgment*, 33 IND. L.J. 467 (1958) 14

Margaret A. Berger, *Procedural Paradigms for Applying the* Daubert *Test*, 78 MINN. L. REV. 1345 (1994) 7

Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770 (1988) 7, 13

Issacharoff and Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990) 8, 14

Law Review Articles (continued) ***Pages***

Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023 (1989) 7, 8

Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 413 (1987) 7

Melissa L. Nelkin, *One Step Forward, Two Steps Back: Summary Judgment After* Celotex, 40 HASTINGS L.J. 53 (1988) 8

Note, *Summary Judgment in Federal Court: New Maxims for a Familiar Rule*, 34 N.Y. LAW SCH. L. REV. 201 (1989) 8

D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOKLYN L. REV. 35 (1988) 14

David A. Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U. L. REV. 774 (1983) 14

Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988) 14

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit reinstating, on remand from this Court, the district court's grant of summary judgment (**A1-A19**[1]) is reported at 43 F.3d 1311. This Court's decision (**A21-A39**) is reported at 113 S. Ct. 2786 (1993). The Ninth Circuit's original decision (**A40-A45**) is reported at 951 F.2d 1128. The district court's decision (**A46-A55**) is reported at 727 F. Supp. 570.

JURISDICTION

The Ninth Circuit's decision was announced on January 4, 1995. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 3, 1995 (**A20**). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROCEDURAL RULE INVOLVED

Rule 56 of the Federal Rules of Civil Procedure provides in relevant part:

> (c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
>
> (e) . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

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[1] Page references to the appendices to this Petition are styled "A__."

STATEMENT OF THE CASE

Petitioners Jason Daubert and Eric Schuller are minor children born with severe and permanent limb-reduction birth defects. They and their parents ("plaintiffs") brought separate suits for damages in California state court against respondent, Merrell Dow Pharmaceuticals, Inc. ("Merrell"), alleging that the birth defects had been caused by the mothers' ingestion of Bendectin, a prescription anti-nausea drug marketed by Merrell. Each complaint alleged several state-law causes of action (strict liability, negligence, and breach of warranty). Merrell removed the lawsuits to federal district court based on diversity of citizenship. Merrell then answered the complaints denying, *inter alia*, that the minor plaintiffs' birth defects had been caused by Bendectin. The cases were consolidated for all purposes pursuant to Fed. R. Civ. P. 42.

Merrell subsequently moved for summary judgment, asserting that "[t]here is now nearly universal scientific consensus that Bendectin does not cause birth defects," so that no genuine issue on causation existed.[2] Fed. R. Civ. P. 56(c) provides that summary judgment motions are to be decided on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." The *only* material listed in Rule 56(c) that was submitted by Merrell was the two-page affidavit of Stephen H. Lamm, a physician and epidemiologist who is President of Consultants in Epidemiology and Occupational Health, Inc. **A57-A59**. Dr. Lamm stated that he had reviewed all of the epidemiological literature on Bendectin and human birth defects; solely on the basis of that review, he expressed his opinion "that maternal use of Bendectin during the first trimester in pregnancy is not a risk factor for human birth defects in general, for limb reduction defects specifically, or for any other particular human birth defect." **A59**; *see also* **A22**.

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[2] Defendant's Memorandum in Support of Its Motion for Summary Judgment on the Issue of Causation ("Def. Mem."), filed Aug. 3, 1989, at 2.

Pursuant to Fed. R. Civ. P. 56(e), plaintiffs responded to Merrell's summary judgment motion and Dr. Lamm's affidavit by submitting testimony, in deposition and affidavit form, from eight experts whom plaintiffs had identified prior to Merrell moving for summary judgment. These experts, each of who is skilled in several relevant scientific and medical disciplines, reported their conclusion that Bendectin is a human teratogen (i.e., a substance capable of causing malformations in human fetuses) that produces limb defects in human fetuses when ingested in normal therapeutic doses during the limb-formation period of pregnancy.[3]

The district court found plaintiffs' expert testimony inadmissible on the ground that it did not meet the "general acceptance" test for scientific evidence announced in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). **A23**. The court of appeals affirmed on this ground. **A23-A24**; *see also* **A40-A44**, **A48**. Plaintiffs then filed a petition for certiorari, raising two central objections to the court of appeals' use and application of the *Frye* rule to exclude plaintiffs' expert testimony. *See* **A24, A36-A37**. This Court granted certiorari, **A24**, unanimously ruled that the *Frye* test was supplanted by the Federal Rules of Evidence, **A24-A28**, vacated the summary judgment, and remanded for further proceedings. **A36**. This Court also offered a number of "general observations" (**A32**) on the proper construction of Fed. R. Evid. 702. *See* **A28-A34**.

Upon remand, Merrell requested supplemental briefing on its contention that the Ninth Circuit should itself apply the new Rule 702 "*Daubert* framework" to plaintiffs' expert testimony, rather than remand the case to the district court.[4] Plaintiffs objected to this course on a number of grounds, the most fundamental of which was that:

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[3] *See* **A22-A23** & n. 2; *see also* Brief for Petitioners, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, No. 92-102, at 2-12 (summarizing plaintiffs' expert testimony); Reply Brief of Petitioners, No. 92-102, at 2-5 (same).

[4] *See* Motion of Appellee Merrell Dow for Leave to File Supplemental Brief on Remand, filed July 22, 1993.

> under the new *Daubert* framework, the single affidavit that Merrell presented to the District Court in support of its motion is inadmissible. Because Merrell's affidavit is inadmissible, and because Merrell's motion is not supported by any other admissible evidence, Merrell has failed to meet its threshold burden under Fed. R. Civ. P. 56(c) to show the absence of a genuine issue of material fact. Accordingly, there is no basis for even considering the admissibility or sufficiency of plaintiffs' rebuttal testimony proffered under Rule 56(e).[5]

Plaintiffs' opposition to Merrell's motion documented in detail why, on the existing record, Dr. Lamm's affidavit could not be held admissible under the new *Daubert* framework. Plaintiffs noted that "[t]here is absolutely nothing in the record to demonstrate the scientific validity of Dr. Lamm's principles and methodology" and that plaintiffs had previously "presented affirmative evidence that what little he does say about his methodology reveals that it is an invalid means of drawing *any* conclusion, pro or con, about the safety of Bendectin."[6]

Given the inadmissibility, under this Court's new *Daubert* standard, of the *only* material listed in Rule 56(c) submitted by Merrell to demonstrate that Bendectin does not cause birth

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[5] Opposition of Plaintiffs-Appellants to Motion for Leave to File Supplemental Brief on Remand, filed July 29, 1993, at 6-7.

[6] *Id.* at 8. In particular, four affidavits of plaintiffs' experts established that Dr. Lamm's methodology — "that of analyzing only human data, and failing to consider animal data or pharmacological data," *id.* — was too incomplete to be a valid methodology for determining whether a drug is capable of causing birth defects. *See id.* at 8-9 (quoting Crescitelli Aff. ¶ 7-8 ("it is scientifically improper to rely solely upon epidemiology studies to determine whether or not a drug is a teratogen"); Newman Aff. ¶ 9 (scientists dealing with the subject of limb development "would not rely solely upon epidemiological data to draw conclusions about the ability of a chemical, e.g., drug, to affect the cells in the developing human fetus"); Swan Aff. ¶ 5, 7 (determinations of teratogenicity "are not made solely on epidemiological data," but only "add another body of data to other scientific data . . . to enable one to reach an opinion concerning the effect of the agent"); Glasser Aff. ¶ 6 (epidemiological data "can only give a guideline" concerning "whether or not a drug is a teratogen")).

defects, plaintiffs argued that Merrell had not met its burden to "show," by reference to the materials listed in Rule 56(c), the absence of a genuine issue of material fact, a burden recognized in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), and left unchanged by *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).[7] Although Merrell's reply to plaintiffs' opposition to supplemental briefing addressed other points made by plaintiffs, its reply did not dispute that Dr. Lamm's affidavit was inadmissible, and that Merrell had failed to provide any other Rule 56(c) materials to support its claim that Bendectin does not cause birth defects.[8]

Nonetheless, the court of appeals ordered supplemental briefing. In its supplemental brief Merrell again did not dispute plaintiffs' contention that Merrell had failed to make any initial Rule 56(c) showing that Bendectin does not cause birth defects. Rather, Merrell's brief exclusively attacked the Rule 56(e) materials filed by plaintiffs in response to Merrell's motion.[9]

In their responsive supplemental brief, plaintiffs pointed out that Merrell had offered "no excuse for its failure to meet its threshold burden of demonstrating the lack of a genuine issue of material fact concerning causation" and that "Merrell's repeated failure to defend its own Rule 56(c) submission can signal only one thing: Merrell has no defense."[10] After again summarizing

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[7] *Id.* at 9-10.

[8] Reply of Defendant and Appellee Merrell Dow Pharameuticals [sic] Inc. to Plaintiffs-Appellants' Opposition Re: Supplemental Briefing on Remand, filed August 6, 1993.

[9] Supplemental Brief on Remand of Appellee Merrell Dow Pharmaceuticals Inc, filed August 20, 1993.

[10] Supplemental Brief on Remand of Plaintiffs-Appellants, filed Sept. 7, 1993, at 6-7 & n.4. For example, plaintiffs noted that "Merrell's whole effort on summary judgment to prove that 'Bendectin does not cause birth defects,' Def. Mem. at 2, was contradicted by Merrell's own Sept. 1981 Bendectin package insert, which warned: 'BECAUSE IT IS NOT POSSIBLE TO PROVE THAT A DRUG TAKEN BY A PREGNANT WOMAN DOES NOT, ON RARE OCCASIONS, CAUSE BIRTH DEFECTS BENDECTIN SHOULD BE TAKEN ONLY WHEN CLEARLY NEEDED.' Att. 1 to Plaintiffs' Opp. to Mot. for Summ. Judgment at 2 (emphasis added)." *Id.* at 9 n.6.

why Dr. Lamm's affidavit was inadmissible under the new *Daubert* framework, plaintiffs concluded that "[b]ecause Merrell chose to rely *exclusively* on Lamm's affidavit to 'show' the absence of a genuine issue under Rule 56(c), and because Merrell is not permitted in this Court to improve its showing, summary judgment must be denied, without review of plaintiffs' evidence."[11]

The court of appeals accepted plaintiffs' argument (never contested by Merrell) that Dr. Lamm's affidavit was inadmissible under the new *Daubert* standard, and that Merrell's motion was unsupported by reference to any other types of materials listed in Rule 56(c), but nevertheless reviewed the adequacy of plaintiffs' Rule 56(e) submission.[12] In rejecting plaintiffs' argument that summary judgment could not be granted based on Merrell's unsupported motion, the court held that plaintiffs

> misunderstand the moving party's burden on summary judgment. Because plaintiffs bear the ultimate burden of proof on causation, Merrell had only to point to the absence of a genuine issue of material fact; it wasn't required to produce any evidence at all. *See Maffei v. Northern Insulation of New York*, 12 F.3d 892, 899 (9th Cir. 1993). Thus, the admissibility of Merrell's expert's affidavit is beside the point; the question is whether plaintiffs adduced enough admissible evidence to create a genuine issue of material fact as to whether Bendectin

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[11] *Id.* at 9-10.

[12] The court of appeals correctly summarized the factual predicate of plaintiffs' argument: that plaintiffs "weren't required to come forward with any evidence to survive summary judgment because the affidavit of Merrell's expert was itself inadmissible under *Daubert*; the burden thus never shifted to plaintiffs to demonstrate a genuine issue as to causation." **A5**. On this factual point, the court of appeals assumed that Dr. Lamm's affidavit was inadmissible, but stated that plaintiffs "fail[ed] to mention the many other exhibits offered by Merrell." **A5**. However, the other exhibits attached to Merrell's summary judgment motion and discussed in its summary judgment brief (Exhibits B through I) were not Rule 56(c) materials showing that Bendectin does not cause birth defects; indeed, they were almost exclusively copies of decisions by other courts in other Bendectin cases.

caused their injuries. *See Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068, 1071-72 (6th Cir. 1993).

A5.

Plaintiffs sought *en banc* rehearing with respect to this holding, arguing that it conflicts with the construction of Rule 56 adopted by several other circuits, based on those circuits' interpretation of this Court's *Adickes* and *Celotex* decisions.[13] A vote was taken on the petition, which failed to receive a majority of the votes (**A20**).

REASONS FOR GRANTING THE WRIT

This case presents the question of what initial burden, if any, Fed. R. Civ. P. 56 imposes on a moving party that seeks summary judgment on the ground that the non-moving party cannot prove its case. This basic question arises on a regular basis in federal courts across the country. As Professor Berger recently noted, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), "did little to abate the confusion" over this issue; "[c]urrent law is far from clear on the precise nature of the standard of proof that applies to the defendant's initial burden of production in moving for summary judgment."[14] Numerous other scholars have voiced similar concerns on this subject.[15]

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[13] Petition for Rehearing and Suggestion for Rehearing *En Banc*, filed January 18, 1995, at 8-11.

[14] Margaret A. Berger, *Procedural Paradigms for Applying the* Daubert *Test*, 78 MINN. L. REV. 1345, 1377 (1994).

[15] *See, e.g.*, Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 413, 462 (1987) ("Remarkably, after almost fifty years of experience with the Federal Rules of Civil Procedure, it is still difficult to summarize burdens of production and persuasion under Rule 56."); Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1048 (1989) (noting "the fundamental, unresolved question of summary judgment: What is the burden of production on the moving party, particularly the defendant, when this party will not have the burden at trial?"); Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 778 (1988) ("[T]he hair-splitting differences among the [*Celotex*] Justices [over] when the record contains

1. The circuits are deeply divided over the proper interpretation of Rule 56 and of *Celotex* concerning a summary judgment movant's burden when the non-movant will have the ultimate burden at trial. The majority view is that under Rule 56, "whoever has the burden at trial" automatically "has the burden on summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). As one prominent study shows, in sixty percent of cases in which defendants win summary judgment, courts engage in *no* "'discussion of the sufficiency of the defendant's production in support of the summary judgment motion.'" *Id.* at 608 n.8 (quoting Issacharoff and Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 92 (1990)). *See also* Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1047 n.173 (1989) ("a scan of the recent court of appeals decisions citing *Celotex* shows a heavy emphasis on the majority's restatement of the opposing party's burden of response, and little concern with the moving party's burden of production. Indeed, most of these opinions merely assert or assume that the moving party has met the production burden without citing the portions of the record or the preview of evidence establishing this conclusion.") (citations omitted).[16]

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something that might conceivably result in valid evidence in support of respondent's case are confusing to say the least."); Note, *Summary Judgment in Federal Court: New Maxims for a Familiar Rule*, 34 N.Y. LAW SCH. L. REV. 201, 203 (1989) ("Despite three decisions in one term, the proof required and the process of proof, in summary judgment motions, remain unclear."); Melissa L. Nelkin, *One Step Forward, Two Steps Back: Summary Judgment After* Celotex, 40 HASTINGS L.J. 53, 54-55, 85 (1988) ("One troubling area in summary judgment law has been the standard of proof required to meet the moving party's initial burden of producing evidence in support of the motion"; "the Court should articulate clearly the requirements for meeting the moving party's initial burden").

[16] *See, e.g.*, *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 1995 U.S. App. LEXIS 6142, *9 (2d Cir. Mar. 24, 1995); *Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068, 1071-72 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1299 (1994); *Augustine v. GAF Corp.*, 971 F.2d 129, 132 (8th Cir. 1992); *ACLU Foundation of Southern California v. Barr*, 952 F.2d 457, 469

The majority approach flows largely from an initial observation in the *Celotex* plurality opinion that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at 322. *See Russ v. International Paper Co.*, 943 F.2d 589, 591 (5th Cir. 1991) (per curiam), *cert. denied*, 503 U.S. 987 (1992). The majority's interpretation of *Celotex* is also partially attributable to the *Celotex* plurality's statement that a summary judgment motion "may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." 477 U.S. at 323. This passage was prominently cited by the Sixth Circuit in a decision (endorsed by the Ninth Circuit below, *see* **A5**) reiterating that *Celotex* permits a defendant to move for summary judgment based simply on the assertion that the plaintiff cannot prove its case. *See Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068, 1071-72 (6th Cir. 1993). Under this view of *Celotex*, "the movant [can] challenge the opposing party to 'put up or shut up' on a critical issue," and "if the respondent [does] not 'put up,' summary judgment [is] proper"; thus, "a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989).

The idea that a movant has no burden to "show," based on the materials listed in Rule 56(c), the absence of a genuine issue has not been accepted by the Fifth, Seventh, Tenth and Eleventh Circuits. In the view of the Eleventh Circuit, for example, the

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(D.C. Cir. 1991); *In re Brazier Forest Products, Inc.*, 921 F.2d 221, 223 (9th Cir. 1990); *Howard v. Gleason Corp.*, 901 F.2d 1154, 1159 (2d Cir. 1990); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989); *J.E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 618 (3d Cir. 1987) (Becker, J., concurring).

majority approach reflects a "common[] misunderst[anding] and misappli[cation]" of *Celotex*. *Clark*, *supra*, 929 F.2d at 607. The Eleventh Circuit regards *Celotex* as holding only that "where neither party could prove either the affirmative or the negative of an essential element of the claim — exposure to Celotex's products — Celotex had met its burden by showing that [the plaintiff] would not be able to meet its burden of proof at trial," by pointing to specific deficiencies in the plaintiff's interrogatory answers on a key factual issue. *Id.* at 607 (citing *Celotex*, 477 U.S. at 320, 322-23). "Even after *Celotex*, it is never enough simply to state that the non-moving party cannot meet its burden at trial." *Id.* at 608. In subsequent cases, the Eleventh Circuit has firmly held to this analysis of a movant's Rule 56 burden.[17]

The Fifth Circuit also regards *Celotex* as subject to a "common misinterpretation" concerning the burden placed on a summary judgment movant. *Russ*, *supra*, 943 F.2d at 591. In its view, the *Celotex* plurality's mention of the "plain language of Rule 56(c)" is widely "cited out of context. These words do not fix the burdens each party must carry on a motion for summary judgment. Simply filing a summary judgment motion does not immediately compel the party opposing the motion to come forward with evidence demonstrating material issues of fact as to every element of its case." *Id.* Instead, to the Fifth Circuit, "*Celotex* makes clear that before the non-moving party is required to produce evidence in opposition to the motion, the moving party must first satisfy its obligation of demonstrating that there are no factual issues warranting trial," based on the

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[17] *See, e.g.*, *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (stating that "[t]he movant's initial burden consists of a responsibility to inform the . . . court of the basis for its motion and to identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.") (internal quotations and brackets omitted); *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 & n. 19 (11th Cir. 1991) ("the moving party may support its motion for summary judgment with affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial," or else "must point to specific portions of the record in order to demonstrate that the nonmoving party cannot meet its burden of proof at trial").

"pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," specifically itemized in Rule 56(c). *Id.* at 592. "This initial burden remains with the moving party even when the issue involved is one on which the non-movant will bear the burden of proof at trial"; "the Court in *Celotex* did not hold that any time a party with the burden of proof at trial is faced with a motion for summary judgment it must come forward with competent evidence to support its theory of liability, regardless of what showing the movant has made." *Id.* at 592.[18]

Similarly, the Seventh and the Tenth Circuits agree that a movant for summary judgment is obligated to demonstrate, by reference to the materials listed in Rule 56(c), that no factual issue exists for trial. *See Schroeder v. Barth, Inc.*, 969 F.2d 421, 423 (7th Cir. 1992) (requiring that the moving party "identify for the court, from among all of the material of record, which includes the pleadings and affidavits on file, the absence of any genuine issue of material fact"); *Schertz v. Waupaca Cty.*, 875 F.2d 578, 581 (7th Cir. 1989) (stating that the moving party "me[ets its] initial burden [by] explaining the basis of its motion and calling the court's attention to the parts of the record which [it] claim[s] to demonstrate the absence of a factual issue"); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993) (requiring that the moving party identify "places in the record showing a lack of disputed fact"); *Manders v. Oklahoma Dept. of Mental Health*, 875 F.2d 263, 264-65 (10th Cir. 1989) ("The moving party's burden may be met when that party identifies those portions of the record which demonstrate the absence of a

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[18] *See also Willis v. Roche Biomedical Labs, Inc.*, 21 F.3d 1368, 1371 (5th Cir. 1994) (stating that "the movant might satisfy its burden shifting obligation by either: (1) submitting evidentiary documents that negate the existence of some material element of the opponent's claim or defense; or (2) demonstrating that the evidence in the record insufficiently supports an essential element of the opponent's claim or defense"); *Schaefer v. Gulf Coast Regional Blood Ctr.*, 10 F.3d 327, 330 (5th Cir. 1994) (per curiam) (requiring that moving party must "inform the court of the basis for its motion and point out those portions of the pleadings, depositions, answers to interrogatories, and admissions on file that demonstrate the absence of a genuine issue of material fact and show that it is entitled to a judgment as a matter of law").

genuine issue of material fact").

The issues concerning the proper interpretation of Rule 56 and of *Celotex* have been fully ventilated in the lower courts, and this Court should grant review to resolve the continuing confusion over the nature of a summary judgment movant's burden, in an area where there is a strong need for a simple, clear, uniform rule.

2. As the conflicting circuit decisions and voluminous scholarly commentary suggest, see pp. 7 & n.15, 8-12, *supra*, certiorari is especially appropriate because the circuit conflict over the nature and extent of the moving party's initial summary judgment burden is largely attributable to imprecise language in the *Celotex* plurality opinion, which has led lower courts to reach differing conclusions as to the thrust of that opinion and the requirements of Rule 56(c). Indeed, three justices expressed concern over precisely this issue, predicting that "the Court's opinion will very likely create confusion" because "the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the non-moving party cannot prove its case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 329 (1986) (Brennan, J., joined by Burger, C.J., and Blackmun, J., dissenting). Justice Stevens voiced similar concerns over *Celotex*'s unduly "abstract" observations regarding the nature of a moving party's burden under Rule 56(c). *Id.* at 339 (Stevens, J., dissenting).

3. The better view, consistent with the unambiguous holding of this Court in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), is that a moving party *always* has the burden to "show," by reference to the materials listed in Rule 56(c), that the non-moving party cannot prove its case. After all, Rule 56(e) explicitly states that the non-movant is not even required to respond until after "a motion for summary judgment is made *and supported* as provided in this rule" (emphasis added) — i.e., supported by the Rule 56(c) materials. As one circuit has pointed out, "[n]o Justice in either the majority or the dissent in *Celotex* ever questioned that the *Adickes* rule remained the generally applicable rule," and the *Celotex* plurality opinion

"reiterated that 'of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.'" *Clark*, *supra*, 929 F.2d at 608 (quoting 477 U.S. at 323 (quoting Rule 56(e))).[19]

The prevailing majority practice also poses a substantial danger to efficiency and fairness in the administration of justice. Dean Friedenthal, for example, has argued that to "require a party with the burden of proof . . . to make a pretrial showing that it could support its case with some evidence," at the demand of its opponent, would be "extremely wasteful." Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 772, 776 (1988). "The purpose of summary judgment is to save courts and litigants from the burdens of trying cases where no genuine dispute exists, not to raise the stakes by meaningless procedural devices." *Id.* at 776-77. Permitting a party, "merely

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[19] The other opinions in *Celotex* (mentioned, but not quoted, in *Clark*) plainly support the conclusion that no *Celotex* justice disputed the requirement that the movant must always "show," based on the materials listed in Rule 56(c), that the non-movant cannot prove its case. *See* 477 U.S. at 328 (White, J., concurring) ("the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case"); *id.* at 332 (Brennan, J., joined by Burger, C.J., and Blackmun, J., dissenting) ("If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party. If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the Court need not consider whether the moving party has met its ultimate burden of persuasion.") (citation omitted). As already noted, Justice Stevens did not reach the issue of a movant's initial burden under Rule 56(c), arguing instead for an affirmance on a narrow factual ground and criticizing the views of the other eight Justices as an "abstract exercise in Rule construction." 477 U.S. at 339 (Stevens, J., dissenting).

by filing an unsupported motion, [to] force an opponent to make a substantial showing" creates "a strong incentive to make such a filing, if for no other reason than to harass the other party and raise its costs of litigation." *Id.* at 776. The probable result of this practice is a "likely increase [in] aggregate legal expenditures, thus producing a corresponding deadweight loss to society."[20]

4. This case squarely presents the Rule 56 issue on which the federal courts are divided. The judgment below depends upon the validity of the majority interpretation of *Celotex*, which permits summary judgment movants merely to assert that a non-movant with the ultimate burden at trial cannot prove its case, with no requirement that the movant canvass the materials listed in Rule 56(c) in support of that assertion. The only Rule 56(c) material offered by Merrell with its summary judgment motion to support its claim that Bendectin does not cause birth defects was the two-page affidavit of Dr. Lamm, which is concededly inadmissible under this Court's *"Daubert I"* decision. See pp. 4-6, *supra*.

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[20] Issacharoff and Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 103 (1990). *See also* Bauman, *A Rationale of Summary Judgment*, 33 IND. L.J. 467, 467 (1958) ("the incorrect use of the summary judgment procedure obviously increases delay and expense in the final disposition of litigation and thus aggravates the very problem the procedure was devised to solve"); David A. Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U. L. REV. 774, 775-76 (1983) ("when motions for summary judgment are improperly employed, they create an additional layer of time-consuming activity in the litigation process"); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 171 (1988) ("suggestions that more widespread use and granting of summary judgment will lead to faster, less expensive adjudication (irrespective of the accuracy of outcome) overlook several considerations militating against such anticipated benefits"); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOKLYN L. REV. 35, 41-42 (1988) (criticizing construction of Rule 56(c) to permit the moving party, with little effort, to force the non-movant "to dredge, structure, collate and cross-reference all materials in the file," a task that "can sometimes take as long or longer than actually trying the case," at the risk of an outright loss "if this task is done with less than complete thoroughness").

Nonetheless, the Ninth Circuit ruled that Merrell's motion was adequate, following the majority approach to Rule 56(c), and after that critical ruling affirmed the grant of summary judgment against plaintiffs. If the approach followed by the Fifth, Seventh, Tenth and Eleventh Circuits had been applied, as a matter of law Merrell's summary judgment motion would have been denied.

* * *

This Court previously granted certiorari in this case to resolve an important issue of federal evidence law as to which the lower courts had been divided for more than a decade: whether the *Frye* rule for scientific evidence was supplanted by enactment of the Federal Rules of Evidence. Because Dr. Lamm's Rule 56(c) affidavit cannot meet the standard for admissibility set out by this Court in *Daubert I*, this Court now has the opportunity, by granting certiorari again, to settle an important issue of federal civil procedure that has been unresolved for more than half a century, an issue that has become the subject of even more confusion and uncertainty since this Court's splintered decision in *Celotex*. See pp. 7-8 & note 15, *supra*.

The issue of what initial burden, if any, Fed. R. Civ. P. 56 imposes on a moving party that seeks summary judgment on the ground that the non-moving party cannot prove its case arises daily in federal courts through the nation. The issue should be promptly and definitively settled by this Court.

CONCLUSION

For all these reasons, certiorari should be granted.

Respectfully submitted,

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